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Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S. W.
Washington, D.C. 20554

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MAY 18 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Notice of Ex Parte Communication in Implementation of
the Local Competition Provisions in the
Telecommunications Act of 1996, CC Docket No. 96-98**

Dear Ms. Salas:

Yesterday, on behalf of Qwest Communications Corporation ("Qwest"), the undersigned and Jennifer Purvis of Hogan & Hartson L.L.P.; Genevieve Morelli, Senior Vice President, Government Affairs and Senior Associate General Counsel, Qwest; and Anne Cullather, Senior Director, Local Connectivity, Qwest; met with Jake Jennings and Chris Libertelli of the Policy Division of the Common Carrier Bureau. The purpose of the meeting was to discuss the issues to be considered by the FCC in the April 16 Second Further Notice of Proposed Rulemaking in the referenced proceeding, on remand from the U.S. Supreme Court in AT&T v. Iowa Utilities Board, S.Ct. No. 97-826, et al. (Jan. 25, 1999). The points made in the attached handout were discussed at the meeting.

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I have hereby submitted two copies of this notice to the Secretary, as required by the Commission's rules. Please return a date-stamped copy of the enclosed (copy provided).

Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in cursive script, reading "Linda L. Oliver / cc".

Linda L. Oliver
Counsel for Qwest Communications
Corporation

Enclosures

cc: Jake Jennnings
Chris Libertelli

Section 251(d)(2) Must be Read in Light of Goals and Structure of Act.

- The purpose of the Act is to promote competition in the provision of local *services*, not merely to promote investment in local *facilities*.
- Emphasis was on bringing competition in the local market to *all consumers*, and on removing entry barriers in a market that is characterized by enormous economies of scale and scope.
- The network element provisions of the Act are essential to the achievement of these statutory objectives.
- Commission policy should be to promote innovation in creation of new applications, new pricing structures, and new services. Such innovation is not dependent on ownership of local facilities.
- Full service competition will not be possible if local facilities ownership remains a prerequisite to competing in the market for full-service offerings.
- Encouraging duplicate investment makes no sense from a public interest point of view if that investment is not economic. Consumers will just pay more for service in that case.

The Necessary and Impair Test Contemplates That Network Elements Must Be Made Available Unless There is a Wholesale Market for a Particular Network Element.

- Section 251(d)(2) of the 1996 Act is written from the point of view of the requesting carrier.
- From the requesting carrier's point of view, the question is whether there is a wholesale market for that network element.
- In either case, *interchangeability* of the competitively supplied element with that of the ILEC is an essential prerequisite.

- Interchangeability depends on the existence of operational systems that enable CLECs to substitute a competitively supplied (or self-supplied) network element for that of the ILEC without material delay, reduction in quality, or increase in cost.
- Materiality of cost, delay, and quality differences:
 - ◊ These differences are “material” if they affect the ability of a competitor to serve its intended customers with the services that competitors chooses to offer, and to do so on a profitable basis.
 - ◊ The wholesale market test is largely a qualitative, not quantitative, test, so it is unnecessary to define with great precision what “material” means.
- The existence of a wholesale market also depends on the existence of a sufficient number of vendors to produce *effective wholesale competition* for a particular network element.
- MTAs (major trading areas) or a similar large area that functions as a market (from the point of view of requesting carrier) could be used as the relevant wholesale market for purposes of determining whether a network element can come off the mandatory list.

Meaning of Term “Proprietary”

- It is not the element itself that is proprietary; it is a *component* of the element that may be proprietary.
 - ◊ Difference between “necessary” and “impair” has to do with the difference between a test that applies to characteristics or components of the element (in the case of “necessary”) versus a test that applies to the network element itself (in the case of “impair”).
 - ◊ Third party proprietary interests are not covered by the term “proprietary.”

Specific Network Elements That Must Be Unbundled

- There is no wholesale market for any of the network elements on the FCC's original list, because interchangeability does not yet exist for any of the element (although progress toward a wholesale market is taking place for some).
- The mandatory UNE list should be revised to reflect advances in technology.
 - ◊ The definitions of loop, switching, and transport should be clarified to include broadband loops and packet technologies.
 - ◊ Broadband loops should include xDSL, DS1, DS3, and OC-N.
 - ◊ Dark fiber should be a network element.
- The Section 271 checklist shows that Congress believed that at least these five elements were clearly mandatory network elements.
- The broad definition of network element shows Congressional intent to provide competitors with broad access to the incumbent network. Such a definition would make no sense if elements as integral to the local exchange network as loops, switching and transport were not on the list at all.
- The burden of proof to show lack of impairment is on the ILEC.
- The essential facilities doctrine is not relevant to this inquiry.
 - ◊ Congress could have used this test but did not.
 - ◊ Section 251(c)(3) of the Act would have been unnecessary if the essential facilities doctrine is all that was intended, because the antitrust laws already apply to the ILECs. Congress must have intended a much different standard, as is clear from Sections 153(29), 251(c)(3), and 251(d)(2).
- The availability of retail services is completely irrelevant to whether a network element should be made available.

The FCC Should Reinstate its Rule Requiring ILECs to Combine Elements for the Requesting Carrier.

- The Supreme Court decision eliminated the basis for the Eighth Circuit's decision to vacate Rule 315(c)-(f).
- The FCC's original rationale for adopting the rules remains equally strong today.

Process for Establishing, Adding, and Removing UNEs From the Mandatory List.

- The FCC should establish a nationwide list of mandatory network elements. Nationwide rules are critical, as FCC recognized in the August 1996 Local Competition Order, and as experience since 1996 has shown.
- The FCC should establish whether interchangeability of elements has been achieved.
 - ◊ Since operational systems generally are accomplished established on an ILEC-wide basis, the FCC can evaluate this on a regional basis.
 - ◊ The burden is on ILECs to show interchangeability, because they have the necessary data, and they have it within their power to make it happen.
- Once interchangeability has been established, the FCC should then determine, on petition from an ILEC, based on a sufficiently large geographic area (e.g. MTA), whether a wholesale market exists throughout that area for a particular network element.

Role of the State Commissions

- The state commissions can have a role similar to Section 271 consultative role. They will develop a factual record, with the FCC making the ultimate decision.
- State commissions have the ability (indeed the duty) to determine whether additional network elements should be added to the mandatory list as part of their duty to arbitrate interconnection agreement disputes.
- As a matter of state law, too, state commissions have the authority to augment the FCC's mandatory list without regard to whether network elements meet the federal Act test.